

Respectfully 1-80

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE : CRIMINAL TERM : PART 2

Wade/Huntley
Hearing

THE PEOPLE OF THE STATE OF NEW YORK

Indictment No.:
97-1542

- against -

CORY EPPS,

Defendant.

92 Franklin Street
Buffalo, New York
December 9, 1997

B e f o r e :

HONORABLE JOSEPH P. MCCARTHY,
Justice.

A p p e a r a n c e :

FRANK J. CLARK, III., ESQ.,
Erie County District Attorney,
BY: PATRICIA I. CARRINGTON, ATTORNEY AT LAW,
Assistant District Attorney,
Appearing on behalf of the People.

ANDREW C. LOTEMPPIO, ATTORNEY AT LAW,
Appearing on behalf of the Defendant.

Maureen C. Laughlin, CSR, RPR, RMR
Official Court Reporter

FILED
SEP 15 AM 9:26
CLERK'S OFFICE

I N D E X

PEOPLE'S WITNESSES:

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PEOPLE'S EXHIBITS:

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(Whereupon, a photo array was marked People's Exhibit 1 for identification.)

(Whereupon, a photograph of lineup number one was marked People's Exhibit 2 for identification.)

(Whereupon, a photograph of lineup number 3 was marked People's Exhibit 3 for identification.)

THE COURT: I was scheduled for a hearing in the matter of People versus Cory Epps. People ready?

MS. CARRINGTON: Yes, Your Honor.

THE COURT: Defense ready?

MR. LoTEMPIO: Yes, Your Honor. We need Mr. Epps brought over.

THE COURT: Yes.

THE DEPUTY: I'll call again.

(Recess.)

MR. LoTEMPIO: Judge, can we have Mr. Epps' cuffs off?

THE COURT: Please, yes.

This is the matter of People versus Cory Epps. We're here for the purposes of conducting what form of omnibus hearing?

MS. CARRINGTON: A Wade and Huntley hearing, Your Honor.

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2 THE COURT: Let's proceed.

3 MS. CARRINGTON: Your Honor, for the record,
4 I'd like to indicate that I've turned over to Mr.
5 LoTempio approximately half an hour ago a number
6 of documents in this matter: P-73 from Officers
7 Hoefler and Bratton, also one from Officers
8 O'Donnell and Piech; a report from Officers Bohen
9 and Minor regarding showing the photograph array;
10 report from Officer Minor regarding a phone call he
11 received from the witness in this case concerning
12 an identification that was not part of any
13 procedure; police report from Detectives Masecchia
14 and Constantino from December 6th regarding
15 possible Brady material and identification of
16 another possible defendant in this matter, not in
17 particular related to this hearing; also, a P-73
18 from Officers Littere and Gizzo two reports from
19 Officer Bohen, one dated June 9 and one dated June
20 25th, regarding show-up and a photograph array of
21 another individual thought to be a suspect in the
22 case in which the witness did not identify; a P-73
23 from Detective Ray Masecchia; lineup sheets and
24 witness sheets from Detective Henry Smardz; a
25 photograph of the rights card that Mr. Epps signed

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2 before Detective Masecchia questioned him; a
3 schematic and evidence report from Detective Smardz
4 pertaining to the lineup; a redacted statement from
5 the witness to this crime; and, also, a redacted
6 activity report from Detective John Bohen
7 indicating how this individual's name came to light
8 in regard to his preparing the photographic array
9 that was shown in this case.

10 Your Honor, up to this point in time the
11 People have not released the name of the -- there's
12 only one witness in this case at this time. And we
13 have not released her name based on the fact that
14 she was the victim of an assault in which she was
15 threatened with regards to testifying against this
16 defendant. No one was ever arrested for that
17 assault. She was not able to identify anyone. But
18 I've redacted all the police reports I gave to Mr.
19 LoTempio in regard to her name and in regard to her
20 address. I do not intend to call her as a witness
21 based on the testimony that the Court will be
22 hearing regarding the identification, both through
23 the photo array and through the lineup.

24 And, pursuant to People versus Chipp, which
25 the Court is well aware, it's our position that

Bohen - Direct - Carrington

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neither of those identifications were at all suggestive and, therefore, we don't need to call her. And she also had independent basis, but we don't believe that's necessary to prove at this time. I just wanted to make the Court aware that all the documents -- I believe all the documents I've provided Mr. LoTempio do not contain the name of that witness.

MR. LoTEMPIO: That's incorrect, Your Honor. There is a photo lineup sheet that has her signature at the bottom. I just noticed her name and wrote it down.

THE COURT: Let's proceed.

MS. CARRINGTON: All right. Thank you, Your Honor. People call Detective John Bohen.

J O H N B O H E N , having first been duly sworn, testified as follows:

THE CLERK: Please state your name and address for the record. Would you spell your last name.

THE WITNESS: John Bohen, B-O-H-E-N. 74 Franklin Street, Buffalo, New York.

THE CLERK: Thank you.

THE WITNESS: You're welcome.

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EPPS 01700

Bohen - Direct - Carrington

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DIRECT EXAMINATION BY MS. CARRINGTON:

Q. Sir, how are you employed?

A. The Buffalo Police Department.

Q. What is your rank there?

A. Detective.

Q. What bureau?

A. Homicide.

Q. In May through July of this year did you have occasion to investigate a shooting which took place on May 26th at Delavan and Chelsea in the City of Buffalo?

A. Yes, I did.

Q. And, in connection with your duties in regard to that case, did you have occasion to prepare a photographic array?

A. Yes, I did.

Q. Showing you what's been marked for identification as People's Exhibit 1, could you examine that and tell the Court if you recognize it?

A. Yes. This is the photo array I set up.

Q. On June 6th of this year did you have occasion to show that array to a witness in the case involving the shooting of Tomika Means at Delavan Chelsea?

A. I thought it was July 6th that I showed this.

Q. I believe that's what I stated.

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EPPS 01701

Bohen - Direct - Carrington

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THE COURT: No. Excuse me. You said June
6th.

MS. CARRINGTON: I'm sorry. Yes, July 6th.

THE WITNESS: July 6th. Yes.

Q. Who was with you when you showed that array to
the witness?

A. Detective Reginald Minor.

Q. And how did you come to show her that array?

A. Went to her house and, while in her kitchen,
opened up the array to her, asked her if she wore glasses.
She stated no. Told her to take her time, look the array
over very careful. If she sees anyone in the photo array
that looks familiar to her, to point to that person and state
what that person did.

Q. Was anyone else present in the room besides
yourself and Detective Minor when you conducted this
procedure?

A. No.

Q. Did Detective Minor say anything to her prior to
her viewing the array?

A. No.

Q. Can you explain for the Court how you showed her
that array?

A. Yes. I opened up the array, basically, like it

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EPPS 01702

Bohen - Direct - Carrington

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is right now, and showed it to her, told her to take her time, look it over very careful. She pointed to the photograph in number five slot. In a very excited voice, she grabbed her chest, she said, that's him. That's the man who shot -- that's the guy who shot Tomika. I swear to God that's him.

Q. Approximately how long did she look at People's Exhibit 1 prior to making that statement?

A. Oh, probably, maybe, less than two minutes.

Q. Did either you or Detective Minor say anything to her to influence her which individual to point out?

A. Not at all.

Q. What did you do then?

A. I then had her sign, date and put the time on the white sticker that appears behind the photo in slot number five. I also had her sign a photo array affidavit, which is a standard procedure, and she signed that.

Q. Is People's Exhibit 1, which has been marked for identification, in the same condition now as it was at the time you showed it to the witness?

A. Yes, other than the small red sticker, People's Exhibit sticker.

Q. Grand Jury Exhibit.

A. That was, obviously, not on there when I showed

Bohen - Direct - Carrington

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her that, but the condition is the same.

MS. CARRINGTON: Your Honor, at this time I would ask that People's Exhibit 1 be moved into evidence.

THE COURT: You wish an examination on the exhibit?

MR. LoTEMPIO: No, Your Honor. I have no objections to its entrance.

THE COURT: Received.

MR. LoTEMPIO: I'll do it as part of my cross-examination.

(Whereupon, People's Exhibit 1 was received and marked in evidence.)

Q. Approximately how long were you at the witness' home prior to showing her the array?

A. Probably five minutes.

Q. And then after she made the identification, what did you do further?

A. I asked her if she knew him. She stated no. I told her what his name was. She said, I -- I don't know him, but I've heard of him.

Q. After showing the witness the array, did you say anything to her to indicate whether or not she had picked, quote unquote, the right person, or did you make any

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EPPS 01704

1 Bohen - Direct - Carrington 10

2 statement to her regarding the individual she had picked?

3 A. Nothing.

4 Q. And did Detective Minor make any such statement?

5 A. No, he did not.

6 MS. CARRINGTON: Thank you. Nothing further
7 of this witness.

8 CROSS-EXAMINATION BY MR. LoTEMPIO:

9 Q. Detective, the incident that was the subject of
10 this photo array occurred on the 25th of May, 1997?

11 A. Correct.

12 Q. And the photo array --

13 MS. CARRINGTON: Objection.

14 THE COURT: Excuse me?

15 MS. CARRINGTON: Objection, Your Honor. I
16 believe it was the 26th.

17 THE COURT: 26th is the date --

18 THE WITNESS: Right.

19 THE COURT: -- that was provided to me as the
20 basis of this offense.

21 MR. LoTEMPIO: I'd ask that be stricken and
22 I'll rephrase the question. I misspoke.

23 Q. On the 26th this event occurred of May, 1997?

24 A. That's correct.

25 Q. Okay. And the photo array that you showed to

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Bohen - Cross - LoTempio

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this witness was shown on the 6th of July, 1997?

A. That's correct, sir.

Q. Approximately a month and a half afterwards?

A. Yes, sir.

Q. What date was it that you actually put the photo array together?

MS. CARRINGTON: Objection. Relevance.

THE COURT: Overruled. I think counsel has a right to know under what circumstances Mr. Cory's photograph entered the array and formed the basis of it.

Q. Do you remember what day you put the array together?

A. No, not exactly, sir.

Q. Okay. You've conducted various other photo arrays prior to this date?

A. I believe I conducted one.

Q. This is the first time you've actually put a photo array together?

A. No, sir.

MS. CARRINGTON: Objection, Your Honor.

THE COURT: Overruled.

MS. CARRINGTON: I'm not clear as to whether he's referring to this case or all cases.

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Bohen - Cross - LoTempio

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THE COURT: I said it was overruled because the question was all right. Do you want to repeat it?

(Whereupon, the above-requested question and answer were read by the Court Reporter.)

Q. You've done other photo arrays in other cases in the past, true?

A. That's true.

Q. Okay. And would it be fair to say that when you put the photo arrays together, as a course of conduct, you take the original description and try and find photos that match the description given of a perpetrator?

A. That's correct.

Q. In this particular case, prior to preparing the photo array that contained Cory Epps' picture, did you review this particular witness' statements to the police given the night of the incident?

A. No, I did not.

Q. Okay. In other words, Mr. Epps' photograph was not taken randomly out of a photo book due to the fact that his description matched the description that was given the night of the incident?

A. It was -- his photograph was picked by me. It was not on any conversation that I knew that the witnesses

EPPS 01707

Bohen - Cross - LoTempio

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gave. It was by description, yes.

Q. Okay. My question to you is this. Did you put Mr. Epps' picture in the photo array because somebody told you his name or because his pedigree information, his description of his weight, height, color of skin, complexion, matched the description that was given the night of the incident?

A. Yes.

Q. That's why you did it?

A. Yes.

Q. Okay. You filled out a P-73, did you not?

THE COURT: Excuse me. I missed the point as to which of the two he was responding to in your question. Did you take Cory's picture and put it in a lineup and then try to get stand-ins or similarities of stand-ins within the photo array?

THE WITNESS: No. I took his picture and found other pictures that looked similar to him and then made up --

THE COURT: That's what I was trying to say. As opposed to, as Mr. LoTempio asked you, reviewing the witness' statement relative to a description of a person on the night in question and then utilizing Mr. Epps' photograph among others

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EPPS 01708

Bohen - Cross - LoTempio

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similar?

THE WITNESS: Yes. I went by his -- the physical description given by the witness as to matching his photograph to other photos being used.

THE COURT: You want to try again.

MR. LoTEMPPIO: I'll ask again.

Q. When you put Cory Epps' picture in the photo array, did you have a name?

A. Yes.

Q. It was Cory Epps, was it not?

A. Correct.

THE COURT: See. That's the point we're asking. Did you put Epps' photograph as the starting point of your array?

THE WITNESS: Yes.

THE COURT: And, I guess, the answer to that is yes

MR. LoTEMPPIO: Okay.

Q. So, in other words, it wasn't just a blanket description and then you went through a mug book and tried to find people who match the description?

A. That's correct.

Q. That's not what happened?

A. No. I had his name.

EPPS 01709

Bohen - Cross - LoTempio

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Q. Okay. So, in other words, at no time prior to the July 6th showing of the photo array did you alone by description pull Cory Epps' photograph out of a book?

A. Prior to July 6th?

Q. Right. Only after his name was given to you?

A. No. Right.

Q. Okay.

A. Only after his name was mentioned, yes.

Q. Okay. On what date was it that Cory Epps' name was given to you?

A. I believe it was June 26th of this year.

Q. Okay. Would it be fair to say that the person who gave Cory Epps' name to you was related to the victim, Tomika Means?

A. Yes, it would be.

Q. It was also somebody who was not on the scene of the shooting?

A. Yes.

Q. Now, prior to showing the witness in this case the photo array, what investigation did you conduct to determine whether or not that particular witness knew Cory Epps prior to showing the photo array?

A. That -- the person that called me, you mean?

Q. No.

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EPPS 01710

Bohen - Cross - LoTempio

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A. Or the witness to the shooting? I'm sorry.

Q. The witness to the shooting name is Jackie Bradley, true?

A. Correct.

Q. Prior to showing Jacqueline Bradley the photo array on July 6th, 1997, did you conduct any investigation to determine whether or not she knew Cory Epps?

A. No, I don't believe we did.

Q. Okay. You testified on direct examination that she told you in her kitchen that she did not know the individual in the photo array, true?

A. That's correct.

Q. And that she had heard his name before, but never saw him before?

A. Her words were, I don't know him, but I've heard of him.

Q. Okay. She didn't tell you that she's seen him around or seen him in bars before, but didn't know what his name was prior to you telling her?

A. She didn't tell me that.

Q. Did you ever review her statement from the night of the incident?

A. No, I didn't.

Q. Are you aware -- did anybody make you aware

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EPPS 01711

Bohen - Cross - LoTempio

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that she said that the person, who did the shooting, she was familiar with and had seen him out in bars on previous occasions?

MS. CARRINGTON: Objection.

THE COURT: Sustained.

Q. She told you in the kitchen that she never saw the person before the shooting, true?

A. No. She said, I don't know him, but I've heard of him.

Q. On direct examination Ms. Carrington asked you a question as to what conversations you had with him and you said that -- or the conversations you had with her, and you said that, I don't know him, but I've heard of him before, true?

A. That's correct.

Q. Okay. And that's what you're repeating now?

A. Correct.

Q. True. Okay. Now, in your practice as a police officer in showing these photo arrays, did you usually make inquiry of the witnesses to determine whether or not the witness knows the individual who was the subject of the identification?

A. Usually I do.

Q. Okay. What is the purpose of that?

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EPPS 01712

Bohen - Cross - LoTempio

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MS. CARRINGTON: Objection.

THE WITNESS: Well --

THE COURT: I'll allow for it. Go ahead.

Q. Why do you ask them if they know the person?

A. I honestly don't know why I do.

Q. Okay. Would it be fair to say, if they already know the person, and you're giving him a multiple choice test, they already know the answer to the test?

A. That's possible, yes.

Q. All right. In this case, prior to you showing the photo array, somebody related to the victim called you and gave you the name Cory Epps, true?

A. That's correct.

Q. All right. Did you make any inquiry of that person as to whether or not they had discussions with Jacqueline Bradley?

A. I didn't ask that.

Q. Okay. Did you ask Jacqueline Bradley, prior to showing her the photo array, if she had discussions with the person who gave you the name Cory Epps?

A. No, I didn't.

Q. Okay. You had no discussion as to whether or not there was any communication between those two people?

A. Correct.

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EPPS 01713

Bohen - Cross - LoTempio

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Q. You don't know and can't testify as to whether or not the names were passed back and forth?

A. I don't know that.

MR. LoTEMPIO: I have no further questions.

Thank you.

THE COURT: Anything on redirect?

MS. CARRINGTON: Just one question to

clarify.

REDIRECT EXAMINATION BY MS. CARRINGTON:

Q. When you were given the information that led you to put Cory Epps in the photographic array, which is People's Exhibit 1, did you also check the description and compare it to the description given by the witness that night?

A. Yes.

Q. And did it generally fit the description?

A. Yes, it did.

MS. CARRINGTON: Thank you.

THE COURT: I thought you told Mr. LoTempio that you never reviewed the statement that was given by the witness.

THE WITNESS: I didn't review the statement, sir.

THE COURT: You reviewed something else that made reference to the statement?

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EPPS 01714

Bohen - Redirect - Carrington

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THE WITNESS: Yes. I had prior information of what Mr. Epps looked like -- or not what Mr. Epps looked; what the suspect looked like, the description of him.

THE COURT: You can press the point, if you want.

MR. LoTEMPIO: Thank you, Your Honor.

RECROSS-EXAMINATION BY MR. LoTEMPIO:

Q. Can you tell us what it is that you looked at that magnified or documented the description that Ms. Bradley gave on the night of the incident of the shooter of Ms. Means?

A. I don't think I looked at anything specifically. It was -- it was people talking in the office, you know. It was nothing that I looked at personally as to a description. It was other detectives talking about this case and the description of the suspect.

THE COURT: Okay. So that you had verbal references as to the general description of the shooter?

THE WITNESS: That's correct.

Q. Was the general description of the shooter as being a person 5'8", 5'9" in height?

A. I think it was -- they were saying maybe six

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EPPS 01715

Bohen - Recross - LoTempio

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foot, little shorter, heavysset, medium skin.

Q. Anything about pimples on his face?

A. Yes.

Q. Anything --

A. Pockmarked face, they put that.

Q. Anything about a goatee?

A. Not that I recall.

Q. Anything about his clothing?

A. Not that I recall.

Q. How about the weight of the individual?

A. Heavysset.

Q. Okay. Not a distinct weight of 250 pounds?

A. Not that I remember.

Q. Not a distinct height described as being 5'8",
5'9"?

A. No.

Q. Nothing about a blue pea coat?

A. Not that I recall.

Q. Nothing about a Pontiac 6000 car?

MS. CARRINGTON: Objection.

THE WITNESS: I --

MS. CARRINGTON: Relevance to this.

THE COURT: I don't know about the car having
relevance.

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Bohen - Recross - LoTempio

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Q. Do you remember descriptions of clothing?

A. Do I remember?

Q. Yes. In this talk back and forth, since you didn't review documents?

A. No, I don't. I don't recall if there was any description of clothing being brought up.

MR. LoTEMPIO: I have no further questions.

Thank you.

MS. CARRINGTON: Nothing further.

THE COURT: Thank you, Detective.

MS. CARRINGTON: People call Detective Henry Smardz.

H E N R Y S M A R D Z , having first been duly sworn, testified as follows:

THE CLERK: Please state your name and address, and spell your last name for the record.

THE WITNESS: Henry Smardz, S-M-A-R-D-Z. 74 Franklin, Buffalo.

THE CLERK: Thank you.

MS. CARRINGTON: Your Honor, prior to Sergeant Smardz's testimony regarding this lineup, I just wanted to place on the record the fact that previous counsel in this case, Mr. Abbate, who represented this defendant at the time of the

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EPPS 01717

Smardz - Direct - Carrington

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lineup, made a tape of the proceedings that occurred during the lineup. I have a copy of the tape. Mr. Abbate has a copy of the tape. He told me that he informed Mr. LoTempio that he had it and was willing to give it to him, but that Mr. LoTempio had not requested it. It's not anything I prepared. It's not anything the police prepared. I just wanted to place it on the record so that the Court is aware that that does exist and that Mr. LoTempio has been given the opportunity to obtain it from the previous attorney.

THE COURT: Thank you for the information.

MS. CARRINGTON: Okay.

DIRECT EXAMINATION BY MS. CARRINGTON:

Q. Sir, how are you employed?

A. A detective sergeant with the Buffalo Police Department.

Q. And what unit do you work in?

A. I'm presently assigned to the Evidence Collection Unit.

Q. Is one of your duties as sergeant in the Evidence Collection Unit the conducting of lineups?

A. Yes.

Q. And did you have occasion to conduct a lineup on

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EPPS 01718

Smardz - Direct - Carrington

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July 30th of this year?

A. Yes, I did.

Q. Was that in a case involving the shooting death of Tomika Means on May 26th of this year?

A. Yes.

Q. Could you describe briefly for the Court how this lineup was conducted?

A. First of all, it was notified that there would be a court-ordered lineup through the District Attorney's Office, and the Buffalo Police Homicide Section would be the unit involved, that I would be assisting. And on such and such a date I would make the room available and make sure that we have a stenographer present, make sure the room is available, make sure we have a photographer available and that I have someone assist me with the stand-ins, as far as the stand-ins go. The, you know, the Homicide Section would be the investigating body, who would be in charge of, let's say, rounding up or gathering the individuals who would be stand-ins, along with the suspect-defendant in the lineup, which would be shown on that particular day.

Q. When the defendant came to participate in the lineup, was he represented by counsel?

A. Yeah. Mr. Abbate was his attorney at the time.

Q. And prior to putting the lineup together, did Mr.

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EPPS 01719

Smardz - Direct - Carrington

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Abbate have the opportunity to view the stand-ins?

A. Yes. Initially, the lineup did go off with six individuals. Six black males were viewed. Originally there were eight black males that were present, which would mean seven individuals who would be stand-ins and the defendant himself. So prior to the lineup, two of the stand-ins were excused and then the defendant, along with five others, the total is six, those were the ones we agreed upon and they were the ones that were viewed that particular day in question.

Q. Now, was it your understanding that there was one witness to the shooting who was present to view the lineup on that day?

A. Yes. There were only, all told, aside from myself, and in the gallery portion to view the lineup were a witness to view, Mr. Abbate and an intern, I believe, from his office, yourself and someone from the DA's Office. There was only four individuals all told -- five individuals all told were there.

Q. Do you recall where you placed the witness who was the eyewitness to the event?

A. I'm pretty sure she sat in seat number four in our lineup room, which would be in the center of the room, one of the aisle seats, which would be the front row of the

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EPPS 01720

Smardz - Direct - Carrington

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lineup seating area.

(Whereupon, a one-page document was marked
People's 4 for identification.)

Q. Detective Sergeant, showing you what's been
marked as People's Exhibit 4 for identification, which
defense has a copy, could you review that, please, and
indicate to the Court if you know what it is?

A. Yes. This particular piece of paper is a form
which I make up after the conclusion of the lineup, which
gives the seating arrangements of the individual who would be
present during the viewings of the lineups.

Q. Does that indicate that the witness, Jacqueline
Bradley, sat in seat number four?

A. Yes, it does.

Q. Prior to the lineup being conducted, what, if
anything, did you say to Ms. Bradley?

A. Nothing, except for the normal instructions,
which would be given as far as filling out the report. So
there's a report that we fill out and, basically, I would
have them fill out the reports with the information that I
give them and --

THE COURT: What are your normal
instructions, Detective?

THE WITNESS: Normal instructions are to

Smardz - Direct - Carrington

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fill out the report and, then, if there's any questions to be asked, to bring it up to me and I would take it up with the defense attorney and the District Attorney, if it's a question that would need to be -- a legal matter to be answered.

THE COURT: Did you advise in what method the show-up was to be conducted?

THE WITNESS: Yes, yes.

THE COURT: Would you tell us that?

THE WITNESS: Well, there's two lineups run. So after the lineups, I would tell her that this would be the conclusion of lineup number one. And if there was anybody on stage who they recognize to be the individual that was involved in a particular crime from such and such a date and such and such a time, to fill in that number, because the stand-ins all wear numbered placards around their neck. And she did so. And then she did the same thing in the second lineup, as requested.

Q. Now, you've indicated that there were two lineups conducted. Did the two differ in any way, other than placement of the stand-ins?

A. Not that I know of.

Q. Was anyone required to speak at all during this?

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A. I would have to take a look at my note real quick. It would be included on the bottom of the one report.

(Whereupon, a one-page record of lineup was marked People's Exhibit 5 for identification.)

Q. Showing you what's been marked as People's Exhibit 5, of which defense counsel also has a copy, does that refresh your recollection, Detective Sergeant, as to whether or not anyone was required to speak?

A. Yes, it does. The record of lineup, which is kept in the normal course of business by our department for show-ups, there was no -- no verbal statements were repeated during either lineup one or two.

THE COURT: What do you call that document?

THE WITNESS: It's called P-1362, also known as a record of lineup.

Q. And does that record of lineup also indicate that the stand-ins were required to do a turn on the first lineup that they weren't required to do on the second?

A. Yes. This is, as we call, attitudes being viewed. The first lineup all the individuals stepped forward. They all did a series of quarter turns so they could be viewed forward, their right side of their face could be viewed, the left side of their face and the back of their head could be viewed and, also, every individual walks the

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stage. The second lineup was the same, except the individuals didn't walk. They just stepped forward, did quarter turns and then returned to their positions.

Q. Detective Sergeant, showing you what's been marked as People's Exhibit 2 for identification, can you look at that and tell the Court if you recognize it?

A. Yes, I do.

Q. And what do you recognize that to be?

A. This particular photograph shows the lineup, which would be lineup number one, conducted on 30th of June.

Q. And does that photograph fairly and accurately depict the way the defendant and all the stand-ins appeared on -- excuse me, July 30th, when that lineup was conducted?

A. July 30th, yes. Yes, it does.

Q. They were all dressed in navy blue sweatsuits?

A. Yes. Well, they were coveralls.

Q. Showing you what's been marked as People's Exhibit 3 for identification, could you tell the Court if you recognize that?

A. This is the second viewing or lineup number two, which, once again, was a photograph showing how lineup number two looked when it was viewed.

Q. And when were those photographs taken?

A. They were taken on that date and the clock on the

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wall indicates the time, also. We've got lineup number two went off shortly after two o'clock. The previous one went off shortly before two o'clock.

Q. Would that -- would those two photographs have been taken just prior to the walking and turning that you referred to?

A. Yes. The photographs were taken right after the individuals are paraded upon stage before they have to go through any motions or report any statements or anything like that.

Q. And does People's Exhibit 3 for identification fairly and accurately depict the way lineup number two appeared to July 30th of 1997?

A. Yes.

MS. CARRINGTON: Your Honor, at this time I would ask that People's 2 and 3 be moved into evidence.

MR. LoTEMPIO: No objection, Your Honor.

THE COURT: Received.

(Whereupon, People's Exhibit 2 and 3, respectively, were received and marked in evidence.)

Q. Did the witness, Ms. Bradley, make an identification in regard to lineup number one?

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A. Yes.

Q. How was that done?

A. On the record of attendance, the lineup form, she indicated stand-in number three in the first lineup as the individual whom she identified. And in the second lineup she indicated the individual who was in position number one.

Q. And is the person that she identified as number three in the first lineup here in the courtroom today?

A. Yes, ma'am.

Q. Would you point to him and describe something he's wearing for the Court?

A. It's the black gentleman with the denim jacket and glasses, sitting next to Mr. LoTempio at the defense table.

(Whereupon, a one-page lineup attendance record was marked People's Exhibit 6 for identification.)

Q. Did Mrs. Bradley identify that same gentleman in lineup number two?

A. Yes.

Q. In that lineup he was in position number one?

A. Yes, he was.

Q. Now, prior to lineup number two being conducted, did you have any conversation with her?

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A. No.

Q. Did she have any questions to ask you about the lineup or about the stand-ins?

A. Not really. She was a bit distraught. That I can recall.

Q. When do you recall her becoming distraught?

A. Prior to the first lineup, when the individuals were paraded upon stage, just about the same time the first photograph was taken when all the individuals were facing forward.

Q. When she first saw the defendant?

A. I would believe so, she began sobbing.

THE COURT: What is 6?

THE WITNESS: What do you want to call that?

MS. CARRINGTON: That's her affidavit, a copy of her affidavit.

THE COURT: Affidavit of identification.

MR. LOTEMPPIO: I have no objection to that, either, Your Honor.

THE COURT: Received.

(Whereupon, People's Exhibit 6 was received and marked in evidence.)

MS. CARRINGTON: Your Honor, at this time I'm also going to ask that People's 4 and 5, which are

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the schematic of the room, that's People's Exhibit 4 for identification and People's Exhibit 5, which indicates the names of the stand-ins and descriptive information, that those items also be admitted into evidence at this hearing. I believe Mr. LoTempio indicated to me he had no objection.

MR. LoTEMPIO: I do not have an objection to those documents.

THE COURT: Received.

(Whereupon, People's Exhibit 4 and 5, respectively, were received and marked in evidence.)

Q. Was anything said to Ms. Bradley after her identification of the defendant in lineup number one regarding that identification; did you say anything to her at all?

A. No, I didn't.

Q. And approximately do you recall how long it took her to make that identification?

A. It wasn't too long, that I can recall.

Q. And did you say anything to her prior to lineup number two, give her any further instructions?

A. No. I just -- she had calmed down a little bit more by then and I just said that, you know, lineup number

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two would proceed and then once again make sure that she looked on stage at the stand-ins and to make her identification after they had gone through the motions, which, when they went through that, they were viewed, and after their picture was taken and everything.

Q. And it was promptly that she identified number one in the second show-up?

A. Yes, she did.

Q. Was any other individual seated near her speaking to her at all during this time?

A. No. The closest individual seated to her would be Mr. Abbate. He was in the first row, also. I was standing near the door, which is connected to the one-way viewing glass, which separates the people who would be viewing the lineup from the stage itself. So the closest individual would be myself, Mr. Abbate and then the witness.

Q. Did you say anything to her to influence her about what individual to choose in the lineup?

A. No.

Q. Did Mr. Abbate?

A. No. No, he didn't.

Q. He was defense counsel for Mr. Epps at that time?

A. Yes. He was the representative defense counsel of the day.

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MS. CARRINGTON: Thank you. Nothing further.

CROSS-EXAMINATION BY MR. LOTEMPIC:

Q. Detective Smardz, were you made aware that Ms. Bradley had seen a photograph in a photo array of Mr. Epps prior to the lineup?

A. No, sir.

Q. You've conducted many lineups, have you not?

A. Yes.

Q. In the hundreds?

A. Several hundred, yes.

Q. And often times when lineups are conducted the stand-ins that are used are Buffalo Police Officers?

A. If the individuals fit the description of the suspect, it's not uncommon for us to use them.

Q. In this particular lineup three or four of the individuals were law enforcement officers?

A. To my knowledge, yes, they were, sir.

Q. Okay. And on People's Exhibit 5, which is the police department record of lineup, it indicates the names of the individuals that stood in the lineup, true?

A. Yes. That's part of the information which we receive, would be the names of the individuals standing in and some other bits of information, also.

Q. In the box about two-thirds of the way down the

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sheet of People's Exhibit 5, there's a listing of names, addresses, dates of birth and approximate sizes, true?

A. Yeah. That's a standard operating procedure when we do a lineup. The girl who's the stenographer, secretary, she obtains the information which you have just said.

Q. Okay. And on that document in the first column it says, number one, and that would indicate the number that that person wore in the first phase of the lineup, true?

A. This would be, Yes.

Q. And number two would be the number they wore in the second phase of the lineup, true?

A. Yes.

Q. Okay. In lineup number one the person wearing number one was Thomas Mayes of 1285 Genesee Street, true?

A. According to that information I would say it would be true, sir.

Q. He's a Buffalo Police Officer, is he not?

A. Yes. I know Tommy Mayes.

Q. Number two, Vern Beatty of 2747 Bailey Avenue is a Buffalo Police Officer, is he not?

A. Vern Beatty, yes, I believe so.

Q. Number three was Cory Epps, the defendant?

A. Correct.

Q. Number four was Jerel Martin, who is a civilian,

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1 true?

2 A. Yes. I do not know Jerel.

3 Q. Okay. Mr. Jerel Martin, do you remember, was,
4 for lack of a better term, cross-eyed?

5 A. He did look like it and the photographs would
6 indicate that, yes.

7 Q. Okay. And Mr. Arthur Burgin of 74 Franklin
8 Street was a law enforcement official, but not a police
9 officer, or was he a police officer?

10 A. No, he's not a police officer. I believe he's a
11 departmental -- he works for the police department. He's a
12 civilian.

13 Q. And Rickey Larke number six, was also a police
14 officer, true?

15 A. Rickey Larke, yes. Rickey Larke is a police
16 officer.

17 Q. And he was of 2747 Bailey Avenue, true?

18 A. Yes.

19 Q. So, of the four law enforcement officials, Mr.
20 Larke, Mr. Burgin, Mr. Beatty and Mr. Mayes, three of them
21 gave the Bailey Avenue or Genesee Street addresses, true?

22 A. Yes.

23 Q. Those are the precincts that they work out of,
24 are they not?

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2 A. Precinct or district houses, I believe, yes.

3 Q. Okay. The last man, Mr. Burgin, gave 74
4 Franklin, which is police headquarters, true?

5 A. Yes.

6 Q. Did you make any inquiry of these individuals as
7 to whether or not they frequent a bar on the east side known
8 as Birchfield's?

9 A. Myself, no, sir.

10 Q. Did anybody do that prior to putting them in this
11 lineup?

12 MS. CARRINGTON: Objection.

13 THE WITNESS: I couldn't answer that, sir.
14 No, I couldn't answer that.

15 THE COURT: Well, he's testing to see if --
16 are you asking whether Mayes, Beatty, Larke and
17 these other people went to Birchfield's bar?

18 MR. LOTEMPPIO: Yes.

19 THE COURT: Do you have any such knowledge?

20 THE WITNESS: No, sir.

21 Q. Were you made aware that the witness in this
22 case, Miss Bradley, had told police officers the night of the
23 shooting that she, in effect, frequents Birchfield's bar?

24 A. Myself, I had no knowledge of that, sir, no.

25 Q. Was any inquiry made to determine whether or not

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she knew any of these police officers or law enforcement officials on sight?

A. Speaking secondhand, I would have to say one of the officers that assisted me in the lineup, I believe, Detective Masecchia, had made a request of the witness regarding that.

Q. What was that request?

MS. CARRINGTON: Objection.

THE COURT: No. I guess hearsay is admissible in these proceedings and what Masecchia spoke to the witness about, whether or not the witness had any familiarity with the what?

THE WITNESS: With the police officers.

That's all I --

Q. When did that happen, before or after the lineup?

A. I would assume before, sir.

Q. She asked -- he asked her if she knew these names?

A. No. I couldn't answer that. All I know is that Ray had told me, due to the fact that we had -- did have police officers in there, which were agreed upon between the DA's Office and Mr. Abbate because of the physical likeness and the description as to Mr. Epps, I believe Mr. Masecchia had asked of the witness if she knew the police officers.

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Q. Did he show them to her and ask her, did she know this guy?

A. No.

Q. He asked if she knew them by name?

MS. CARRINGTON: Objection.

THE WITNESS: I can't answer that, sir. I don't believe he mentioned that.

THE COURT: I'm going to sustain, unless he has a specific recall of what it was that Masecchia said or didn't say, rather than being guessing and speculating.

Q. Do you know if, after -- did you personally, after the lineup, ask this witness whether or not she could exclude four of the individuals in the lineup because she knows they're Buffalo Police Officers?

A. I didn't ask that question.

Q. Did you know if Mr. Masecchia did that or did he tell you anything about that?

A. I know Ray wouldn't have asked because Ray was on the other side of the glass at the time. He wouldn't have had any contact with her.

Q. You were not made aware that Mr. Epps' photograph in a photo array was shown to the witness prior to the lineup?

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THE COURT: Asked and answered.

THE WITNESS: No, sir.

Q. Okay. In the lineup room there's a board behind the subjects that indicates heights of the suspects?

A. That's written -- that's the height indications, which are right on the wall.

Q. Okay. And that measures in feet and inches how tall the individual is that is standing on the stage, true?

A. Yes. That would give the height of the individuals, right.

Q. Okay. Mr. Epps in People's Exhibit Number 3 in evidence stands at six foot two inches tall, does he not?

A. Yes, sir.

Q. And in People's Exhibit Number 2 in evidence, Mr. Epps is in number three position and he also there appears to stand at six foot two inches tall, does he not?

A. Yes, sir.

Q. Okay. Did Mr. Epps -- when you looked for stand-ins, did you notice whether or not Mr. Epps had pockmarks or pimples on his face?

A. That was not my part of the job, sir. That would have come down to the people in homicide. They are the individuals who go out and secure the stand-ins.

Q. Okay. But the pictures that are in evidence

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fairly and accurately represent the complexion of Mr. Epps at the time of the lineup, true?

A. Yes.

MR. LoTEMPIO: I have nothing further. Thank you, Detective.

MS. CARRINGTON: Nothing further of this witness.

THE COURT: Thank you.

MS. CARRINGTON: Your Honor, may I have a moment?

THE COURT: Yes. Why don't we take five or ten minutes. How many more witnesses do you anticipate?

MS. CARRINGTON: Just one.

THE COURT: Why don't we take ten minutes.

(Whereupon, a recess was taken at 3:31 P.M.)

(Whereupon, a Miranda warning card was marked People's Exhibit 7 for identification.)

(Proceedings resumed at 3:50 P.M.)

THE CLERK: Defendant, both counsel present, Your Honor.

THE COURT: Do you want to swear the next witness.

R A N I E R O M A S E C C H I A , having first been duly

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Masecchia - Direct - Carrington

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sworn, testified as follows:

THE CLERK: Would you state your name and address, and spell your first and last names for the record.

THE WITNESS: Raniero Masecchia, R-A-N-I-E-R-O, M-A-S-E-C-C-H-I-A. 74 Franklin Street. Buffalo, New York.

THE CLERK: Thank you.

DIRECT EXAMINATION BY MS. CARRINGTON:

Q. Sir, directing your attention to July 9th of 1997, were you working in your capacity as a homicide detective for the City of Buffalo on that day?

A. Yes, I was.

Q. Did you have occasion to come into contact with a Cory Epps on that day?

A. Yes.

Q. Do you see Mr. Epps in the courtroom here today?

A. Yes, I do.

Q. Please point to him and describe something he's wearing for the Court?

A. He's seated to my right, wearing a blue jean jacket and glasses.

Q. How did you happen to come into contact with Mr. Epps on July 9th?

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Masecchia - Direct - Carrington

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A. We came into contact with him twice that day; once over at 720 East Amherst Street, and then again back at the homicide office. He was out in the hallway of our building at 74 Franklin Street. He came with his girlfriend, Jerriah Johnson, I believe her name is.

THE COURT: Well, 720 East Amherst, what was the occasion of you making contact there?

THE WITNESS: We went there to observe a car that was parked in that area. It was parked, actually, behind the home at 720 East Amherst and our initial reason for going there was to talk to Jerriah.

THE COURT: Okay. You went to observe a car that was parked. Go ahead.

THE WITNESS: In the rear of the home there.

THE COURT: Parked in the rear of 720 East Amherst.

THE WITNESS: That's correct.

THE COURT: And that is the alleged residence of who?

THE WITNESS: Of Jerriah Johnson, I believe her name was.

THE COURT: Do you know how to spell it?

THE WITNESS: You got me. Johnson I can.

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2 THE COURT: Johnson, Jerriah?

3 THE WITNESS: Jerriah is how you pronounce
4 it.

5 THE COURT: Okay. Go ahead. I'm sorry.

6 Q. When Mr. Epps came down to 74 Franklin, was he
7 brought down by the police or did he come of his own accord?

8 A. No. He came with his girlfriend on his own
9 accord.

10 Q. And was he placed into custody at any time on
11 July 9th?

12 A. No.

13 Q. When he came downtown, did you have occasion to
14 speak with him?

15 A. Yes.

16 Q. And at approximately 2:50 in the afternoon did he
17 agree to speak to you regarding the shooting of Tomika Means?

18 A. Yes, he did.

19 Q. How did that come about?

20 A. We brought him into our interview room, explained
21 to him we wanted to talk to him in regards to the shooting of
22 Tomika Means.

23 Q. Did he indicate he was willing to cooperate with
24 you?

25 A. Yes.

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Masecchia - Direct - Carrington

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Q. Did you, nonetheless, read him his so-called Miranda warnings at that time?

A. Yes, I did. I did it from a rights card.

Q. Showing you what's been marked as People's Exhibit 7 for identification, would you please examine that and tell the Court if you recognize it?

A. Yes. This is the rights card that was read to Cory Epps by myself on July 9th, 1997.

Q. Did he sign and initial that card for you?

A. Both sides, yes.

Q. And did you also initial the card?

A. Yes, I did.

Q. Now, after reading him that card, did you indicate to him -- did you ask him if he understood his rights?

A. Yes.

Q. What did he say to you?

A. I asked him after every question and he said he understood.

Q. Other than the exhibit marker placed on this document by the stenographer, is this document in the same condition as it was the day you used it to read Mr. Epps his rights?

A. That's correct.

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MS. CARRINGTON: At this time I would ask
that People's 7 be moved into evidence.

MR. LoTEMPIO: No objection, subject to
cross-examination.

(Whereupon, People's Exhibit 7 was received
and marked in evidence.)

Q. Using what's been marked People's 7 in evidence,
can you indicate to the Court how you used that document to
inform Mr. Epps of his rights?

A. I read them to him one at a time: You have the
right to remain silent. Do you understand that? I would
wait for a response. If he nodded or said yes, I would
continue to the next question, and he did. Anything you say
can and will be used against you in a court of law. Do you
understand that? He replied that he did. You have the right
to talk to a lawyer and have him present with you while you
are being questioned. I asked him if he understood that. He
responded.

Q. How did he respond?

A. Affirmative, that he understood. If you cannot
afford to hire a lawyer, one will be appointed to represent
you before any questioning, if you wish one. I asked him if
he understood these rights that I have explained to him. He
said he did. Having these rights in mind, do you wish to

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talk to us now, and he implied that he would talk to us.

Q. Did he tell you that he wished to speak to an attorney prior to talking to you?

A. No.

Q. Did you then take a three-page statement from Mr. Epps?

A. Yes.

Q. How was that statement conducted?

A. In the interview room on a typewriter, it was typed by my partner, Detective Juan Morales, and the questions were asked by myself.

Q. At the close of that statement did Mr. Epps sign it?

A. Yes, he did. He reviewed it first, then signed it.

Q. And after the statement was completed, what did Mr. Epps do?

A. He left.

Q. So he was free to leave?

A. Yes, he was.

Q. Did you -- you did not place him under arrest at that time?

A. That's correct, we did not.

(Whereupon, a three-page statement of the

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defendant was marked People's Exhibit 8 for
identification.)

Q. Detective, showing you what's been marked
People's Exhibit 8 for identification, which defense counsel
has a copy, would you please examine that three-page document
and tell the Court if you recognize it?

A. Yes. This is the typewritten statement that was
taken on July 9th, 1997, of Cory Epps in my presence at the
interview room at the Homicide Office.

Q. Is that a Xerox copy of the --

A. That appears to be.

Q. And is it identical in every way to the actual
statement that was signed by Mr. Epps in your presence?

A. Yes, it is.

Q. Did you make any promises to him at any time
during the course of that statement to induce him to talk to
you?

A. Absolutely not.

Q. Did he at any time indicate he wanted to stop
talking to you and retain an attorney?

A. No, he did not.

Q. Did your partner in your presence make any
promises to him?

A. No.

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Q. Did either of you threaten Mr. Epps at any time?

A. No.

Q. After that statement was completed, he was free to leave?

A. Yes, he was.

Q. Reviewing that statement, does that contain any errors that have since come to your attention?

A. The date, May 26th, is correct, but it was supposed to be a Sunday night and it's marked on here as a Saturday night.

Q. So all the references to Saturday in that statement really refer to Sunday into Monday morning?

A. Into Monday morning, when she was found, yes.

Q. And approximately what time was that statement concluded?

A. 1600 hours, which is four P.M.

Q. So Mr. Epps was in your office for approximately how long?

A. One hour and ten minutes, an hour and a half, approximately.

Q. And he at no time during that hour and a half indicated that he wished to leave or stop the statement?

A. No.

Q. Was he completely cooperative with you?

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A. He appeared to be, yes.

Q. Now, did you have occasion to attend a lineup that was conducted in this case on July 30th of this year?

A. Yes, I was.

Q. And where were you when the stand-ins were being put together for that lineup?

A. I was with the stand-ins.

Q. Did the witness in this case, Jacqueline Bradley, ever have an opportunity to view the stand-ins in the lineup prior to the actual lineup taking place behind the one-way mirror?

A. No.

Q. Did you have any discussion with her regarding whether she knew any Buffalo Police Officers?

A. Yes.

Q. When was that discussion; when did that discussion take place?

A. Several days before the lineup at Jacqueline, the witness' home.

Q. Did you discuss with her any particular police officers?

A. No. What I asked her was, that if she knew any police officers who would hang around at Birchfield or O'Boys, because we knew some policemen did hang out there and

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Masecchia - Direct - Carrington

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we wanted her to give us names, if she knew of any. And she stated she didn't know any policemen.

Q. Was any indication ever made to her during the course of the lineup being conducted that some of the stand-ins were police officers?

A. No.

Q. Does People's Exhibit 8 for identification fairly and accurately depict the entire statement that you took from Mr. Epps on that day --

A. Yes, it does.

Q. -- July 9th.

MS. CARRINGTON: Nothing further.

CROSS-EXAMINATION BY MR. LOTEMPIO:

Q. Detective, you said when you went to 720 East Amherst Street, it was what day?

A. It was July 9th.

Q. And that's approximately a month and two weeks after the shooting?

A. I believe so.

Q. Okay. And when you went to that address at 720 East Amherst Street, did that post-date a call from the victim's aunt, wherein she disclosed that a sketch, composite sketch in the paper allegedly looked like Cory Epps?

A. Was that after we received the information that

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Masecchia - Cross - LoTempio

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Cory Epps could have been the shooter?

Q. Yes.

A. Yes.

Q. Okay. And when you went over to 720 East Amherst Street, you told the Judge that you went there to observe a car that was parked behind that residence?

A. And to speak to Jerriah Johnson, Yes.

Q. Okay. The car that was parked behind that residence was a blue car?

A. I don't recall. I believe it might have been a green car that was parked there that day.

Q. Okay. Did you take a picture of the car?

A. Yes, I did.

Q. Picture of that car was then shown to the witness, Jacqueline Bradley, at some point?

MS. CARRINGTON: Objection. Relevance.

THE COURT: I'll take it, if he knows, only because I'd like to know.

THE WITNESS: We showed her pictures of several cars. That one was included, I believe it was.

Q. She said that wasn't the car involved in the incident; isn't that true?

A. None of the cars we showed her.

EPPS 01748

Masecchia - Cross - LoTempio

55

1 speak to first?

2 A. The girlfriend.

3 Q. Okay. And did you inform her, before you spoke
4 to her, that she may be a suspect in the crime?
5

6 MS. CARRINGTON: Objection.

7 THE COURT: Sustained.

8 MR. LoTempio: Was there any communication
9 that could have been transferred from Jerriah
10 Johnson to Cory Epps that either of them were
11 suspected as being involved in the shooting?

12 MS. CARRINGTON: Objection.

13 THE COURT: Speculative. Sustained.

14 Q. Did you tell Mr. Epps at the time that you spoke
15 to Jerriah Johnson that he was a suspect in the shooting?

16 A. Did I tell Mr. Epps that?

17 Q. Yes.

18 A. That day?

19 Q. Yes.

20 A. Yes.

21 Q. That's prior to speaking to the girlfriend?

22 A. No.

23 Q. Okay. After you spoke to the girlfriend?

24 A. Yes.

25 Q. But prior to speaking to Mr. Epps?

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EPPS 01749

Masecchia - Cross - LoTempio

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A. Yes.

Q. Okay. Prior to reading him his Miranda rights?

A. Yes.

Q. Okay. Now, when you asked Mr. Epps questions about what happened, you asked him whether or not he knew Tomika Means, true?

A. Yes.

Q. Okay. And he told you that, in fact, he did know Tomika Means, true?

A. He said he didn't know her, but he had seen her and knew of her.

Q. And that he knew her because he was friendly with her boyfriend?

A. That he knew the boyfriend better, right.

Q. Okay. That he would see Tomika Means in Birchfield's and another nightclub by the name of O'Boys, true?

A. That's correct.

Q. Okay. And that often times, when he saw Tomika Means, she was with many of her girlfriends or some of her girlfriends?

A. Yes.

Q. Were any of the girlfriends' names given to him at that time to see whether or not he knew them?

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EPPS 01750

Masecchia - Cross - LoTempio

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A. No.

Q. Okay. Was there any questioning of Mr. Epps done that would indicate or would disclose to you whether or not he knew Jacqueline Bradley?

A. No.

Q. Okay. So at that point that you questioned him you left it at the fact that he knew Tomika Means and seen her out at Birchfield's with her friends?

A. That's correct.

THE COURT: Well, he said he didn't know her. So the word know, I understand, has different meanings.

Would you read his question to see if my objection is accurate.

(Whereupon, the above-requested question was read by the Court Reporter.)

THE COURT: I don't know that he said he knew her. He would see her. He had heard of her. He didn't know her. I mean, again, what is meant by the word know has many meanings to many people.

Q. In your statement that you took from Mr. Epps you asked the question: If you had seen Tomika out at either Birchfield's or O'Boys that night, would you have recognized her if you saw her? Answer: Yeah, I know Tomika. I see her

EPPS 01751

Masecchia - Cross - LoTempio

58

out all the time. You established that he knew in some fashion who Tomika Means was, true?

A. Yes.

Q. Okay. Then you went on to ask him, do you remember, I see her with Kenyon once in a while. I usually see her with some girls when she be out. Do you remember that?

A. Yes.

Q. Okay. So when you spoke to Mr. Epps on July 9th, 1997, approximately a month and two weeks after the incident, you established that he did know Tomika Means, true?

A. Knew her by sight, yes.

Q. In some fashion. That he had often seen her out with some friends?

A. On occasion, yes.

Q. You didn't follow through with -- follow through at that point in time with any questions to establish whether or not he could identify Jacqueline Bradley on sight?

A. No, we did not.

Q. Okay. Prior to June -- or July 6th, 1997, did you make any inquiry of Jacqueline Bradley to determine whether or not she was one of the friends who would be in the presence of both Cory Epps and Tomika Means in Birchfield's?

MS. CARRINGTON: Objection.

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EPPS 01752

Masecchia - Cross - LoTempio

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THE COURT: Does not the statement represent the conversation you had with the defendant?

THE WITNESS: Yes.

MR. LoTEMPIO: It's not my question.

Q. My question is, did you do any investigation prior to the photo array being shown to Jacqueline Bradley to determine whether or not Jacqueline Bradley knew who Cory Epps was? Did you personally do any investigation?

A. I believe I interviewed and took a statement from

--

Q. From Jacqueline Bradley?

A. -- from Jacqueline Bradley.

Q. That's my question. That was done prior to the photo array being showed to her, true?

A. Yes.

Q. Okay. It also predated the lineup that she viewed, true?

A. Yes.

Q. Okay. Now, you're aware that another detective from homicide testified today?

A. Yes.

Q. Detective Bohen?

A. Yes.

Q. Okay. In the information that you gathered from

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EPPS 01753

Masecchia - Cross - LoTempio

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Tomika -- or from Jacqueline Bradley, would it be fair to say that she told you that in some fashion she knew Cory Epps from Birchfield's?

A. Never mentioned the name.

Q. Did she say that she knew the shooter from Birchfield's?

A. Yes.

Q. Okay. Do you know if she then went on to tell Detective Bohen that she didn't know the guy she was picking out of the photo array until she saw the photograph?

A. I don't know.

Q. So you're indicating to us that when the statement was taken from her the night of the shooting, that she said that she did know the shooter from Birchfield's?

A. Yes.

Q. Now, you said that at some point prior to the lineup date you had discussions with Jacqueline Bradley, wherein there was questions asked of her surrounding Buffalo Police Officers that hang out at Birchfield's?

A. That's correct.

Q. At that point in time, when you spoke to her, were you aware of who the stand-ins were going to be at the lineup?

A. No. We were aware that we were going to try to

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EPPS 01754

Masecchia - Cross - LoTempio

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use several police officers in the lineup because they fit the general description of Mr. Epps. We referred that information to the DA's Office, who then requested us to go over and see if Jacqueline Bradley had any knowledge of any police officers.

Q. Okay. Prior to the lineup actually being conducted, did anybody inquire of Jacqueline Bradley whether she knew Thomas Mayes, Vern Beatty, Arthur Burgin or Rickey Larke by names?

A. No names were mentioned.

Q. So you just blanketly asked her if she knew Buffalo Police Officers?

A. And give me the names of any police officers that you knew or hung around at Birchfield's or that you know personally. She said she knew none.

Q. So no further inquiry was made of her to find out if she knew these people, but didn't know they were police officers?

A. That's correct.

Q. No further inquiry was made to see whether she knew these people from Birchfield's, but weren't aware that they were police officers?

A. No.

Q. Did you have conversations with Detective Bohen

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EPPS 01755

Masecchia - Cross - LoTempio

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1 prior to the photo array being put together?

2 A. I may have.

3 Q. Okay. And do you remember relaying to him a
4 description that was given by Ms. Bradley on the night of the
5 incident?
6

7 A. There was the description in the statement.
8 There were descriptions on different reports.

9 Q. Okay.

10 A. Whether I told him personally, I don't recall.

11 Q. Would it be fair to say that the description in
12 the statement given by Jacqueline Bradley and the description
13 that was then repeated -- withdrawn and I'll rephrase it.
14 The description in the statement given by Jacqueline Bradley
15 is repeated in the P-73s; in other words, nobody changed that
16 description, true?

17 A. I don't know. I'd have to look at the P-73s.

18 THE COURT: What's the question, whether the
19 description data changed or didn't change during
20 the course of the investigation?

21 MR. LOTEMPPIO: Yes. I'll move on.

22 Q. Prior to him putting the photo array, are you
23 aware of any description wherein the perpetrator was
24 described as being six feet tall or taller?

25 A. No, not offhand.

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EPPS 01756

Masecchia - Cross - LoTempio

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Q. The only person who ever gave a description was Jacqueline Bradley, true?

A. Yes.

Q. She's the only one who was in the car when the shooting occurred, true?

A. That's correct.

Q. The description she gave was of a man five foot eight, five foot nine, true?

A. Again, I'd have to look at the statement, look at the --

THE COURT: His looking at it won't change it.

THE WITNESS: I don't know what it says. It could have been anywhere from five eight to five ten.

MR. LOTEMPPIO: Thank you. Nothing further. Thank you, Officer, or Detective.

MS. CARRINGTON: Nothing further, Your Honor.

THE COURT: Okay. Thank you, Detective, retired Detective.

THE WITNESS: Not yet.

THE COURT: Not yet. Okay.

MS. CARRINGTON: Your Honor, the document that's been marked as People's Exhibit 8 is

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EPPS 01757

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2 appended to the file. That's a statement annexed
3 to the 710.30 Notice, so --

4 THE COURT: It's part of the pleadings. Do
5 you have any objection to its admission?

6 MR. LoTEMPIO: None at all. I was going to
7 ask to move it in, anyway.

8 THE COURT: It's received.

9 MS. CARRINGTON: Nothing further.

10 THE COURT: Any further witnesses either on
11 the Wade or on the Huntley?

12 MS. CARRINGTON: No, Your Honor.

13 THE COURT: Any witnesses by the defense?

14 MR. LoTEMPIO: Judge, I would request the
15 opportunity to call Jacqueline Bradley to the
16 stand. Her statement to the police indicates that,
17 as Mr. Masecchia has disclosed, that she knew the
18 individual shooter, she said, on the night of the
19 incident from Birchfield's. The other -- the other
20 officer said he told her -- she told him that she
21 didn't know the individual. If, in fact, she knew
22 Mr. Epps by sight prior to showing the photo array,
23 it would affect the independent source, and I
24 believe I'm entitled to inquire of her as to her
25 knowledge of Mr. Epps either by sight or by name

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2 prior to viewing the photo array.

3 There also seems to be indication that there
4 was some discussion had with her surrounding other
5 occupants of the lineup slots as being possible
6 people who hang out at Birchfield's or being
7 Buffalo Police Officers, and I'd like to clarify
8 those issues.

9 THE COURT: What's the People's position
10 relative to the defense's interest in calling
11 Miss Bradley?

12 MS. CARRINGTON: Your Honor, it's our
13 position that the photographic array and the lineup
14 photos, which are in evidence, show no evidence of
15 taint. That both the array and the lineups
16 conducted were fair and that all the stand- ins
17 were similar to the defendant. Ms. Bradley
18 indicated in her statement to the police that she
19 had seen the shooter around before at Birchfield's.
20 She told Detective Bohen, as he testified, after
21 she made the identification in the photographic
22 array, that she did not know the name of the
23 person. Once he gave her the name, that was the
24 first time she was aware of the name as the person
25 whom she had seen before at Birchfield's and who

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2 was the shooter in this case.

3 Also, I think Detective Masecchia's testimony
4 was clear. He simply asked her if she knew any
5 police officers that hung out at Birchfield's and,
6 if so, did she know their names; and she said, no,
7 she didn't know any police officers. He didn't
8 give her any specific names. There's no situation
9 that she was in any way apprised that there were
10 going to be police officers in the lineup or who
11 they would be. I think it's clear from reviewing
12 photographs of the lineup that there's no way to
13 distinguish by looking at it who the police
14 officers are and are not.

15 So, based on all the testimony and the
16 exhibits that we've adduced at this point, I would
17 submit that the issues regarding the Bradley
18 identification are trial issues and that the
19 fairness of the identification has been shown. So
20 I would object and, also, as I said before,
21 pursuant to People versus Chipp, to calling her as
22 a witness at this hearing.

23 THE COURT: Do you intend any other
24 witnesses?

25 MR. LoTEMPIO: No, Your Honor.

1
2 THE COURT: I'm going to review the evidence
3 in this case, to wit: The lineup, and determine
4 its fairness, as well as reviewing the testimony
5 developed during the proceeding, and make the
6 conclusion with respect to it, and review the
7 authority of People versus Chipp and its language
8 to determine whether there's a basis, based upon
9 this record, to allow for the defense's calling of
10 the complainant as their witness.

11 Obviously, they would call that person as an
12 adverse witness and I presume would wish to conduct
13 a leading examination. My recollection is the
14 authority of the Court of Appeals in People versus
15 Chipp is that that process is not essential to
16 pretrial hearings if the Court otherwise concludes
17 that the identification procedures were conducted
18 fairly. And that the basis of her independent
19 observation and ability to effect identification,
20 where the identification procedures engaged in by
21 the police were fair, is a matter left for trial.
22 So I want to review the submissions first. I'll
23 make a ruling as to it and your ability to call or
24 not call the witness.

25 MR. LoTEMPIO: Just so that my position is

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2 laid out appropriately on the record for purposes
3 of appeal, it's my position that the record does
4 not establish that the identifications were fair
5 because, in fact, if Ms. Bradley knew Mr. Epps by
6 sight prior to seeing the photo arrays and could
7 connect the name -- or his face with the name, or
8 his face with someone she sees in Birchfield's,
9 then it would make the identification procedures
10 unfair, and that's why I would like to question her
11 as to her knowledge of Mr. Epps prior to viewing
12 the photo array. That's all. That's the reason I
13 want to call her.

14 THE COURT: If I knew somebody from seeing
15 him around a bar without knowing their name, why
16 would it be unfair to present that person's picture
17 to me for purposes of identification as to whether
18 that person committed a shooting?

19 MR. LoTEMPIO: Because there's information
20 now in the record that what happened prior to his
21 picture being put in the photo array was that an
22 aunt of the victim called Ms. Bradley on the phone
23 and said, I know someone who looks like the
24 composite sketch.

25 THE COURT: No. The record doesn't say she

1
2 talked to the complainant. That she talked to the
3 police.

4 MR. LoTEMPIO: Well, what actually happened
5 here --

6 THE COURT: Excuse me. When you say what
7 actually happened, I'm talking about the record
8 here.

9 MR. LoTEMPIO: I would like to bring it out
10 from Mrs. Bradley what did happen is that this aunt
11 called Ms. Bradley on the phone and Ms. Bradley
12 called the police and gave them Cory Epps' name.
13 That's what's indicated in the police P-73.

14 THE COURT: Well, I don't know what's in
15 the P-73. All of those are part of the general
16 investigation and they don't constitute evidence in
17 a hearing, unless they're admitted in a hearing.
18 What I have before me is that, I believe, from Mr.
19 Masecchia, was that the victim's aunt, after seeing
20 a sketch, sketch by whom, I don't know, sketch,
21 indicated that the sketch looked like a person she
22 knew to be Cory Epps and, therefore, suggested that
23 Epps' photograph or, at least, Epps' name enter
24 into the investigative process and, apparently,
25 did, and it brought about this identification.

1
2 That's what the record reflects.

3 MR. LOTEMPPIO: Then I should, perhaps, recall
4 the police officer who did the P-73, which was
5 Bohen, who took the phone call from Ms. Bradley
6 and Ms. Bradley gave the name of the aunt who said
7 it looked like Cory Epps. I better do that to
8 straighten the record out.

9 THE COURT: Well, Andy, I only know --

10 MR. LOTEMPPIO: I understand, and I thought
11 that was -- from Mr. Bohen's testimony, that it was
12 established that Ms. Bradley is the one who made
13 the call that said that Mr. Epps' name was being
14 brought up. I have some other requests of the
15 prosecutor, as far as discovery, Your Honor, aside
16 from that issue.

17 THE COURT: Well, you can review this record
18 and see what it is that you do or do not want to do
19 relative to calling witnesses, and I will reserve
20 for the moment this question about whether you have
21 the -- either the authority or the permission to
22 compel the complainant to testify at this hearing.
23 We'll put a period to the day on the question of
24 who can and who cannot and who will and who will
25 not be offered as a defense witness.

1
2 Now, that aside for the moment, what else is
3 at hand here?

4 MR. LoTEMPIO: Today Ms. Carrington handed
5 over what she has, herself, classified as possible
6 Brady material, that being P-73 reports, wherein
7 other names were brought up as suspects in this
8 case prior to Mr. Epps' name being mentioned. They
9 were Carlos Wiggins, Patrick Bush, Donald Faison,
10 F-A-I-S-O-N, Michael Carr, and Damion Morgan. I
11 believe that Donald Faison's picture was also
12 placed in a photo array and shown to Ms. Bradley.

13 I would at this point request a copy of Mr.
14 Epps' mug shot, which is contained in the photo
15 array, and mug shots of the other individuals who
16 were identified as possible perpetrators in this
17 case.

18 THE COURT: You want a copy of the photograph
19 contained in the array?

20 MR. LoTEMPIO: And photographs of Carlos
21 Wiggins, Patrick Bush, Donald Faison, Michael Carr
22 and Damion Morgan. Donald Faison's picture
23 appeared in a photo array.

24 THE COURT: An array, not part of these
25 proceedings?

1
2 MR. LoTEMPIO: Yes, part of these procedures.
3 His picture was also --

4 THE COURT: Part of this hearing?

5 MR. LoTEMPIO: Not part of this hearing.

6 THE COURT: I don't know anything about
7 Faison. Only one of the names you've alluded to as
8 being, quotes, possible suspects, rings a bell with
9 me. I believe he's accused here in a trial that I
10 have scheduled for, I think, Thursday afternoon.
11 Be that as it may, what you're asking for is
12 photographs of other people who were presented to
13 the witness and the witness declined or indicated
14 that those were not people involved in the
15 shooting?

16 MR. LoTEMPIO: Some of the photographs were
17 presented to her. Others, for some reason or
18 another, the police chose not to show her the
19 photograph and said to themselves, this isn't the
20 person; one of them being Damion Morgan, who
21 matched the description, was caught in a car
22 matching the description the same night, and they
23 did not show his picture to Ms. Bradley. I would
24 like these pictures for purposes of strategizing a
25 defense and conducting my own investigation into

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2 this case.

3 Patrick Bush I know has an arrest record and
4 has a mug shot, because I've represented him at
5 least six times. Damion Morgan has an arrest
6 record, because I've had him as a witness in
7 another case. And Michael Carr, I believe, from
8 information from the defendant's family, has an
9 arrest record. And Donald Faison I know has a mug
10 shot, because they showed his mug shot in one of
11 the photo arrays used in this case.

12 THE COURT: Do you have any objection to
13 providing photographs of any of these defendants --
14 strike that, any of these potential, quotes,
15 suspects, close quotes, that were utilized by
16 police in attempting to effect an identification?

17 MS. CARRINGTON: Well, Your Honor, first of
18 all, I don't have any of those photographs. That's
19 --

20 THE COURT: No. But it's a simple -- if the
21 police can get them, the prosecution can get them.

22 MS. CARRINGTON: I don't see the relevance
23 because she's viewed these people in person or the
24 photographs and has said this is not the shooter.

25 THE COURT: Well, on the grounds it is

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2 suggested somewhere that they were, quotes,
3 suspects. I see no harm in providing photographs
4 of people that the police may have thought were
5 involved to a point that in one instance they
6 showed a photograph of that individual to the
7 witness, to wit: Mr. Faison. What use Mr.
8 LoTempio wishes to make of those photographs, I
9 don't know, or I don't care. We're here to see to
10 it that the person accused is properly accused,
11 properly prosecuted and not the wrong man being
12 prosecuted. I don't know what use these other
13 photographs -- how they entered into the
14 investigation. Do you, Mr. LoTempio?

15 MR. LOTEMPPIO: No, not really, other than
16 from the P-73s it would appear that single
17 photographs were either shown, or these people were
18 brought to the woman in person, or a determination
19 was made that they weren't going to show them to
20 her, for what reason the police came up with, I
21 don't know, but I would like to look at the
22 photographs. There is a composite sketch in this
23 case. There are other potential witnesses that I
24 have been speaking to.

25 THE COURT: Well, one can only speculate

1
2 that, perhaps, the sketch generated general police
3 comment that maybe it's this and maybe it's that
4 and maybe it's somebody else on the grounds of the
5 sketch. I haven't seen the sketch.

6 MR. LoTEMPIO: Including Mr. Epps.

7 THE COURT: Please. I don't interrupt you.

8 MR. LoTEMPIO: I'm sorry, Your Honor.

9 THE COURT: I've lost my thought.

10 I can only guess that the sketch may have
11 generated within the police community general
12 people who might possibly come within the purview
13 of that sketch and, perhaps, that's how these names
14 began to generate, because, as far as I know, any
15 of those names are not connected to the event under
16 scrutiny here by way of car or anyone else; is
17 there, Miss Carrington?

18 MS. CARRINGTON: Well, Donald Faison and
19 Patrick Bush, I believe, were both stopped driving
20 in the area that night in cars similar to the cars
21 described. And it's my understanding that they
22 were both brought back to the witness and she said
23 it was not the person, particularly not Mr. Bush.
24 Mr. Faison, apparently, she was upset when she saw
25 him and so that's why they showed a photo array of

1
2 him later and she said, no, that's definitely not
3 the person. The only person that she ever saw a
4 photo array of was Donald Faison. Mr. Bush was,
5 like I said, brought back in person --

6 THE COURT: Show-up situation?

7 MS. CARRINGTON: -- that night and she said
8 that was not the individual. And I believe Mr.
9 Wiggins, that's referred to in a P-73 dated
10 December 6th, that's some information that came
11 up very much after the indictment and the
12 identification procedures that were conducted here,
13 and she has never been shown a photograph of him.

14 THE COURT: I would direct that you obtain
15 the photographs that the police utilized as to
16 these other --

17 MS. CARRINGTON: That would be just --

18 THE COURT: Excuse me.

19 MS. CARRINGTON: I'm sorry.

20 THE COURT: -- as to these people who were,
21 at least, speculated on as being a potential
22 suspect and that were utilized by the police in
23 attempting to effect identification or whose names
24 came up immediately surrounding the event, I guess,
25 the names that Mr. LoTempio has enumerated.

MS. CARRINGTON: Well, the only photograph that was shown is one of Donald Faison.

THE COURT: I understand that. What I'm saying, the other photographs or copies of them can be provided to Mr. LoTempio and we'll see if they have any viability in the proceeding. They had viability at some point in the police mind, correct?

MR. LoTEMPPIO: That's my position, Your Honor.

THE COURT: And if they had viability within the police mind as being a potential prospect, I don't understand why the photographs of them couldn't be shared with the defense, first of all, especially the ones that were shown to the witness, so that Mr. LoTempio can know what that person looked like, and the rejection of that person as being the person who participated in the shooting.

So, as to Mr. Faison, you have one already, don't you, or have you been shown that array?

MR. LoTEMPPIO: I've never seen it.

MS. CARRINGTON: No.

THE COURT: Okay. That's clear. As to two men stopped in the immediate area and were taken

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2 back and evidenced as a show-up, if we have
3 photographs of them that's relatively recent or
4 even their last photograph, I don't see any harm in
5 sharing that with the defense, inasmuch as they
6 were people questioned relative to their potential
7 involvement in this incident and rejected by the
8 witness, as such, but were in the area at the time
9 it occurred in a car not unlike the one that was
10 used. Therefore, their photographs can be utilized
11 by the defense in some means and, therefore, I
12 would allow for their release.

13 Who else, now, did you have? That's three of
14 them.

15 MR. LOTEMPPIO: I've spoke of Carlos Wiggins,
16 Patrick Bush and Donald Faison, Damion Morgan.
17 Michael Carr was driving a car owned by the
18 defendant's cousin, Marvinna Epps, and it was a
19 Pontiac J-6000, which was described in this
20 incident. In that car was a man by the name of
21 Damion Morgan, who seems to also match the
22 description of the shooter, and I would like a
23 picture of him.

24 THE COURT: Damion Morgan is before the Court
25 on a separate matter, in fact, to be resolved by a

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2 plea on Thursday afternoon on a matter that's
3 before this Court. It's on a drug event. I see no
4 harm in releasing his photograph for the defense
5 for whatever purposes they see fit. I mean, it's
6 not as if we're intruding into the confidentiality
7 of photographs of people who the police utilized
8 or thought to utilize in terms of investigating
9 this event. And, therefore, limited to those I'd
10 allow for it. Okay.

11 MR. LoTEMPIO: Thank you, Your Honor.

12 THE COURT: I'll reserve on this question of
13 future witnesses. Your claim is you want to call
14 her and you want to call Bohen back --

15 MR. LoTEMPIO: Yes.

16 THE COURT: -- to affirm or establish how
17 Epps' name first entered the picture and by whom?

18 MR. LoTEMPIO: The actual procedure in which
19 it was -- the call came in. It was a P-73 that
20 seems to indicate that the aunt called Bradley, who
21 called Bohen.

22 THE COURT: Well, if that can be stipulated
23 to --

24 MR. LoTEMPIO: By Miss Carrington?

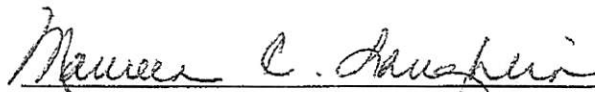
25 THE COURT: Just, if it can be stipulated to

1
2 as being an accurate statement that both parties
3 can concur in, you won't require his re-attendance.
4 Check it out and see if you both agree that's the
5 way it went down. If that's the way it went down,
6 perhaps you can stipulate and avoid his
7 re-attendance. Fair enough.

8 (Proceedings adjourned at 4:33 P.M.)

9 * * * *

10
11
12 I hereby certify that the foregoing is a true and accurate
13 transcript of the proceedings in the matter of the People of
14 the State of New York against Cory Epps, indictment number
15 97-1542.

16 
Maureen C. Laughlin, CSR, RPR, RMR
17 Official Court Reporter
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